No. 97-843

In The

Supreme Court of the United States

October Term, 1998

Aurelia Davis, as next friend of LaShonda D.,

Petitioner,

v.

Monroe County Board of Education, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Respondents misread the plain language of Title IX and this Court's precedents interpreting it to claim that educational institutions are never required to address or remedy student-to-student harassment under Title IX.

Respondents maintain that because Title IX and its legislative history do not specifically mention student-to-student sexual harassment, the Spending Clause's requirement of notice has not been satisfied. Additionally, Respondents insist that Title IX's coverage of sexual harassment depends on whether the person committing the harassment has an agency relationship with the institution. Under their reading of the statute, no matter how severe or pervasive the harassment, how much school officials knew about it, or how capable they were of remedying the misconduct, Title IX provides no authority to the government or the courts to hold schools accountable for refusing to address this form of discrimination. They are wrong on all counts.

Regarding the absence of specific statutory language on student-to-student harassment, as Petitioner demonstrated in her opening brief, the plain language of Title IX supports its coverage. Title IX requires institutions to ensure that students are not "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under" their education programs or activities. *See* 20 U.S.C. § 1681. Accordingly, when a school refuses to remedy a sexually hostile environment targeting a student, that institution violates the explicit terms of the statute. *See* Brief for Petitioner ("Pet. Br.") at 11-16. Petitioner further demonstrated that Title IX's legislative history and interpretations of the statute by this Court and the expert agency charged with its enforcement support this reading of the statute. Pet. Br. at 11-37. Respondents fail to advance an argument as to why the statutory language does not mean what it says.

Moreover, as discussed in more detail below, Respondents' case is utterly at odds with this Court's precedents, most recently *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), which would not

survive under Respondents' Spending Clause analysis. *Gebser* and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), establish that Title IX's broad prohibition against sex discrimination more than amply notified recipients, including Respondents, of their obligations not to "subject" students to sexual harassment, satisfying the Spending Clause notice requirement. Additionally, under *Gebser*, it is abundantly clear that pursuant to Title IX's directive, recipients' failure to address peer sexual harassment subjects them to damages liability under Title IX for their own actions and not those of the initial source of the harassment. Finally, covering student-to-student harassment under Title IX is consistent with the letter and spirit of the statute and its goal of eradicating sex discrimination in federally funded education.

ARGUMENT

I. TITLE IX REQUIRES SCHOOLS TO ADDRESS AND REMEDY STUDENT-TO-STUDENT SEXUAL HARASSMENT.

A. The Spending Clause Does Not Bar Coverage of Student-to-Student Sexual Harassment under Title IX.

Respondents make much of the lack of explicit language in Title IX addressing peer sexual harassment. They note that the statute does not "expressly create a cause of action" for student-to-student harassment; that neither the legislative history nor the regulations mention such discrimination; and that the policy guidance by the Office for Civil Rights is of such recent vintage as to be "irrelevant" for notice purposes. Brief for Respondents ("Resp. Br.") at 9,

14, 18.[1] These arguments misconstrue the requirements of the Spending Clause and directly contradict this Court's decisions in *Gebser* and *Franklin*.[2]

This Court's precedents, most recently *Gebser*, undermine the heart of Respondents' case. An essential predicate to *Gebser* is that Title IX covers teacher-to-student sexual harassment, consistent with *Franklin's* holding. Respondents seem to suggest that these cases did not actually determine that Title IX covered such harassment, but only made damages available. Resp. Br. at 25. However, as an analytical matter, the Court could not have reached the damages issue without recognizing that a cause of action exists for an institution's failure to address and remedy teacher-to-student harassment. *See, e.g.*, *Franklin*, 503 U.S. at 74 ("Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action."). In these cases, the Court interpreted Title IX to encompass teacher-to-student sexual harassment despite the absence of language to that effect in the statute, in its legislative history, and in the implementing regulations promulgated by the expert enforcement agency. Moreover, at the time *Franklin* was decided, there was no formal policy guidance at all regarding sexual harassment.

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[1]Respondents further attempt to buttress their argument that schools lacked notice that condoning sexually hostile environments could violate Title IX by asserting erroneously that this Court "did not address the concept of sexual harassment under Title IX until this year." Resp. Br. at 14. However, the Court had decided *Franklin* eight months before LaShonda first reported the sexual harassment she experienced in her school.

[2]Indeed, Respondents' theory would overrule *Cannon v. University of Chicago*, 441 U.S. 677 (1979), which first recognized a private right of action under Title IX -- despite the lack of *any* express statutory language whatsoever regarding such a cause of action.

Respondents' theory thus would have compelled the Court to deny a cause of action and the availability of damages for teacher-to-student harassment. Respondents fail to acknowledge or address this key element of *Gebser* and *Franklin*, and in so doing, fail to overcome a major weakness in their analysis.

Just as in *Gebser*, the Spending Clause is not a barrier to recognizing that a Title IX recipient may be liable for its failure to remedy the sexual harassment of a student in cases such as this one. Title IX's broad prohibition against sex discrimination, unlike the statute at issue in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), upon which Respondents rely heavily, is neither precatory nor ambiguous. While the "bill of rights" the Court considered in *Pennhurst* merely articulated findings and expressed Congress' goals, Title IX mandates that federal education recipients not "exclude" persons, "deny" them the benefits of, or "subject" them to discrimination "under" their programs or activities. *Compare Pennhurst*, 451 U.S. at 19 (holding that the provision at issue simply was "too thin a reed to support the rights and obligations read into it by the court below"), *with Cannon*, 441 U.S. at 694 (noting that "Title IX explicitly confers a benefit on persons discriminated against on the basis of sex" and recognizing a private right of action);[3] *see*

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[3]The Court has held that the Spending Clause does not require statutes to enumerate every possible cause of action that may arise. *See, e.g., Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("[T]he Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of Title I [of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701.]"). Additionally, the Court has distinguished the strong federal mandate of statutes like Title IX, noting that the "bill of rights" at issue in *Pennhurst* was "at most a nudge in the preferred direction. . . . The contrast between the congressional preference at issue [in that case] and the antidiscrimination mandate of § 504 [of the Rehabilitation Act of

also Pet. Br. at 28 n.14.

Given Title IX's mandate, it is hardly surprising that the Court reaffirmed in *Gebser*, building upon *Franklin,* that teacher-to-student sexual harassment violates the statute. When an institution refuses to remedy sexual harassment of a student it, at the very least, "subjects" that student to discrimination under the education program or activity. The same holds true in the context of unremedied peer sexual harassment. The statute's proscription against sex discrimination -- irrespective of the form it takes -- has provided recipients with sufficient notice for Spending Clause purposes that they had a duty under Title IX to address the sexual harassment of students.[4] *Cf. Salinas v.*

1973, 29 U.S.C. § 794,] could not be more stark." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 286 n.15 (1987) (internal quotation marks and citations omitted). Similarly, Title IX represents a strong federal mandate against sex discrimination that bears no resemblance to the legislative findings considered in *Pennhurst*.

[4]As a measure designed to remedy and prevent sex discrimination, Title IX also is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment. *See, e.g., Cannon*, 441 U.S. at 704 (noting that Title IX was enacted to avoid the use of federal resources to support discriminatory practices and provide individuals with effective protection against such practices); *id.* at 688 n.7 (observing that Title IX is part of the nation's "civil rights enforcement scheme . . . to enforce the 14th amendment by eliminating entirely such forms of discrimination"); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998) (holding that Title IX was enacted pursuant to Section 5); *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir.), *petition for cert. filed*, 67 U.S.L.W. 3083 (July 13, 1998) (same); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) ("[W]e are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5."); *see also* Brief of *amicus curiae* American Civil Liberties Union at 5-13. However, as in *Franklin*, the Court need not resolve the sources of authority for Title IX to decide this case. *See Franklin*, 503 U. S. at 75 n.8.

United States, 118 S. Ct. 469, 475 (1997) (refusing to limit the scope of law prohibiting bribery in programs accepting federal funds, noting that "[a] statute can be unambiguous without addressing every interpretive theory by a party").[5]

B. Under *Gebser*, Schools Are Directly Liable for Their Own Failure to Respond to Sexual Harassment -- Regardless of the Harasser's Status as an Agent of the Recipient.

Respondents mistakenly link this Court's determination regarding liability in *Gebser* to the fact that the harasser was an agent of the school board.

In *Gebser*, this Court specifically considered and rejected the use of agency principles to hold a recipient liable in damages for the conduct of the harasser. 118 S. Ct. at 1996. As *Gebser* made clear, the basis for damages liability under Title IX is the recipient's own failure to address the sexual harassment. *Id.* at 1999. The recipient's failure to respond to such misconduct directly subjects students to

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[5]Respondents further suggest that their purported lack of notice regarding their obligation to remedy peer harassment should entitle them to some form of qualified immunity. Resp. Br. at 12-13. Since the claim at issue is against the school board as a recipient of federal funds, and not against one of the individuals who refused to respond to Petitioner's pleas for help in ending the harassment against her daughter, there would be no qualified immunity even if this were a § 1983 action, and hence there is no basis for creating such immunity here. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) (establishing that public officials acting in their individual capacities are entitled to qualified immunity under § 1983); *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (holding that qualified immunity is not available to local government entities). Moreover, even this action were against individuals under § 1983, injunctive relief would be available. *See, e.g., Felder v. Casey*, 487 U.S. 131, 137 (1988).

discrimination and denies them the benefits and opportunities of the education program, in blatant violation of Title IX. In this regard, *Gebser* clarifies that the appropriate focus is on the relationship between the student and the educational program operated by the recipient, not on the identity of the harasser. *Id.* at 1999-2000. Thus, under *Gebser*, it is clear that the agency relationship between the recipient and the harasser is not necessarily the foundation for a violation of Title IX.

Even under Title VII,[6] where the term "agents" appears in the statute itself, 42 U.S.C. § 2000e(b), employers can be held directly liable for actions of non-agents, as well as those of agents. As this Court has made clear, under Title VII, the crucial issue to be examined is the nature of the conduct and the response of the employer, regardless of whether the harasser is a peer, supervisor, or a non-agent. *See, e.g., Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998, 1001 (1998). Thus, under Title VII, employer liability can turn on the employer's own conduct and not whether the harassment is perpetrated by a supervisor, co-worker, or others. Any agency relationship with the harasser simply is not a necessary predicate for a violation. Similarly, under Title IX, where a school condones sexual harassment among students and perpetuates a hostile and abusive educational environment, the school must be held accountable, whether or not the harasser has an agency relationship with the school.

Respondents' efforts to analogize to tort law concepts or § 1983 to preclude coverage of peer harassment under Title IX also are unavailing. Title IX is not coterminous with tort law or constitutional due process protections. Congress

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[6]The principles of Title VII can inform the analysis of Title IX claims. *Gebser*, 118 S. Ct. at 1995.

enacted Title IX to provide new safeguards against discrimination, which by definition were not necessarily available under other laws.[7] *See, e.g.*, 118 Cong. Rec. 5804 (1972) (noting that Title IX was to provide "women with solid legal protection from . . . persistent, pernicious discrimination"). Even assuming *arguendo* that neither the common law nor the Due Process Clause of the Constitution ever requires an entity to protect citizens from the actions of third persons, as Respondents contend, this fact has no bearing on Title IX and the obligation *it* imposes on educational institutions. Title IX's broad proscription against sex discrimination in federally funded education programs, which does not delineate the perpetrator of the discrimination, places an affirmative duty upon the recipient of federal funds to ensure that students are not "subjected to" sex discrimination.

Finally, Respondents' assertion that the allegations at issue amount to no more than "negligent[] fail[ure] to prevent a student, not an employee from harassing LaShonda" and

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[7]While tort and other state law remedies can reach some of the discrimination prohibited by Title IX, that fact should not foreclose recognizing peer harassment under Title IX. Similar remedies are available in the context of employment; however, they do not preclude the ability of victims to seek relief under Title VII. This is so because Title VII and Title IX are appropriate manifestations of the federal government's power to enact measures to "protect citizens against . . . discrimination." *Cannon*, 441 U.S. at 709. Nor do they address an important purpose of Title IX -- to preclude federal funding of discrimination. *Id.*

Moreover, state remedies do not provide adequate protection for students against sexual harassment, although if Respondents' arguments were to be adopted, *any* state protection would be greater than that provided by Title IX. For example, Georgia law requires only that school boards adopt and mail a student code of conduct to the State Board of Education. Ga. Code Ann. § 20-2-751.3(a) & (c).

therefore do not merit damages relief, completely misses the mark. Resp. Br. at 27. Petitioner's claims fit squarely within the framework *Gebser* and *Franklin* have constructed. Specifically, the gravamen of Petitioner's complaint is that, despite repeated complaints of harmful sexual harassment, Respondents were "willfully and deliberately indifferent" to the discrimination targeting LaShonda. Pet. App. at 98a. Petitioner's complaint -- that Respondents "subjected" LaShonda to discrimination -- thus satisfies the *Gebser* standard for damages. *See, e.g., Morse v. Regents of Univ. of Colo.*, 154 F.3d 1124, 1128 (10th Cir. 1998) (concluding that plaintiff had stated a claim for damages under Title IX where complaint alleged school officials' actual knowledge and failure to take any remedial action regarding peer harassment).

II. REQUIRING SCHOOLS TO REMEDY AND ADDRESS STUDENT-TO-STUDENT HARASSMENT IS CONSISTENT WITH AND ADVANCES TITLE IX'S GOAL OF ELIMINATING SEX DISCRIMINATION IN EDUCATION PROGRAMS AND ACTIVITIES.

Respondents suggest that requiring schools to address sexual harassment by students would make "childish conduct" actionable, result in children carrying the "stigma" of being labeled sexual harassers, and require the courts to second-guess school administrators. Resp. Br. at 13. Respondents ignore the fact that actual discrimination that interferes with an individual's ability to gain an education violates Title IX, not childish behavior. Moreover, Title IX does not require labeling students as harassers. Rather, under Title IX schools are held accountable for whether their conduct meets the statute's principles. Thus, Title IX does not give schools total carte blanche, as Respondents would prefer, to ignore all student-to-student harassment and not be

held accountable. Respondents seek to deny students all protection from discriminatory sexual harassment regardless of its severity and the harm it exacts, regardless of how apparent or remediable by the school it may be. Such a result cannot be squared with Title IX's letter or spirit.

Indeed, requiring educational institutions to address and remedy peer harassment provides students with exactly the kind of protection Congress envisioned when it enacted Title IX. *See* Pet. Br. at 16-25. As this Court has recognized: "No one questions that a student suffers extraordinary harm when subjected to sexual harassment . . . and that the . . . conduct is reprehensible and undermines the basic purposes of the educational system." *Gebser*, 118 S. Ct. at 2000. When students are subjected to misconduct that properly can be termed discriminatory sexual harassment, it necessarily impedes a student's ability to gain an education:

> [S]exual harassment can interfere with a student's academic performance and emotional and physical well-being . . . [P]reventing and remedying sexual harassment in schools is essential to ensure non-discriminatory environments in which students can learn.

See Br. of *amici curiae* NOW Legal Defense and Education Fund *et al.*, at 8 (citing *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties: Final Policy Guidance*, 62 Fed. Reg. 12,034 (1997) [hereinafter *OCR Policy Guidance*]). Because Title IX mandates that institutions not subject students to sex discrimination in their programs and activities, requiring institutions to remedy and address peer sexual harassment is consistent with the statute and advances the federal government's commitment to eradicating sex discrimination in education.

It is important to note that Title IX, like Title VII, "does not prohibit all verbal or physical harassment . . . it is directed only at discrimination because of sex." *Oncale*, 118 S. Ct. at 1002. In this regard, Title IX proscribes

> only behavior so objectively offensive as to alter the conditions of the victim's [education]. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive . . . environment . . . is beyond [Title IX's] purview. . . [T]he objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.

Id. at 1003 (internal quotation marks and citations omitted); *see also OCR Policy Guidance*, 62 Fed. Reg. at 12,041 n.44 (adapting Title VII standards to the education context, noting, for example, that the "reasonableness" standard should take into account the victim's age, *inter alia*). Accordingly, the legal principles that have developed under Title IX, informed by Title VII, ensure that child's play is not actionable under Title IX.

In this connection, covering school-sanctioned peer sexual harassment under Title IX will not lead to automatic liability of schools or a flood of litigation. Title IX requires schools to respond appropriately to sexual harassment -- not perfectly. As the Seventh Circuit has recognized:

> In holding that schools have a duty to take prompt and appropriate action to remedy student-on-student sexual harassment, this Court does not imply that schools must be successful in completely eradicating sexual

> harassment from their campuses and programs.

See Doe, 138 F.3d at 667. The court also observed that Title IX liability for peer sexual harassment does not "threaten to produce . . . a flood [of suits]" and that "[c]ourts are free . . . to dispose of suits that lack merit." *Id.* at 666; *see also* Brief of *amici curiae* National Education Association ("NEA Br.") *et al.*, at 20 n.17 ("Lawsuits can be preempted through preventive and sensible measures employed in schools.") (quoting Nan Stein, *Sexual Harassment in School: The Public Performance of Gendered Violence*, 65 Harv. Educ. Rev. 145, 156-57 (1995)). In addition, the *Doe* court addressed the concern that federal courts would be obliged or required to substitute their own judgment for that of school officials, noting that:

> School officials . . . must decide how to respond . . . . [and] must choose from a range of responses. As long as the responsive strategy chosen is one plausibly directed toward putting an end to the . . . harassment, courts should not second-guess the professional judgments of school officials.

Doe, 138 F.3d at 667; *see also* OCR Policy Guidance, 62 Fed. Reg. at 12,042 ("What constitutes a reasonable response [to sexual harassment] will differ depending on the circumstances."); NEA Br. at 11-13 (citing the range of responses available to schools to address peer harassment).

In fact, requiring schools to address and remedy peer sexual harassment under Title IX will provide schools with the appropriate incentives to prevent this behavior. *Cf. Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292 (1998) ("It would therefore implement clear statutory policy

and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."); *EEOC Policy Guidance on Sexual Harassment*, 8 FEP Manual 405:6699 (Mar. 19, 1990). Indeed, according to the Brief of *amici curiae* National Association of School Boards *et al.* at 27-30, many school districts already are implementing policies, training, and other measures designed to prevent peer sexual harassment and hence are limiting their exposure to liability under Title IX. *See also* NEA Br. at 13-16. Thus, covering peer harassment under Title IX will encourage schools to protect themselves from liability by implementing preventive measures and by taking appropriate steps to remedy harassment when it occurs. In contrast, the Eleventh Circuit's holding and the arguments Respondents advance provide no such incentives for schools and no protection from discrimination for students.

In sum, Respondents' insistence that Title IX imposes no requirements on schools to remedy and address student-to-student sexually harassment is untenable. Title IX's clear mandate against sex discrimination is sufficiently broad to encompass the claim alleged here. For the reasons discussed above and in Petitioner's opening brief, Respondents' arguments to the contrary cannot be squared with this Court's precedents or the language of the statute itself.

CONCLUSION

Petitioner urges this Court to reverse the judgment of the Eleventh Circuit and remand the case.

Respectfully submitted,

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